

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

November 2, 2004

IN RE:

PETITION OF BELL SOUTH  
TELECOMMUNICATIONS, INC. FOR  
EXEMPTION OF CERTAIN SERVICES

DOCKET NO.  
03-00391

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ORDER RESOLVING CONSUMER ADVOCATE'S MOTION TO COMPEL  
DISCOVERY AND FILE SUPPLEMENTAL TESTIMONY

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On June 16, 2003, BellSouth Telecommunications, Inc. ("BellSouth") and Citizens Communications, Inc. filed a *Petition for Exemption of Certain Services* ("Petition") in this docket requesting exemption from regulation of their intraLATA toll service and primary rate ISDN service ("PRI"). This matter is before the Hearing Officer for consideration of the *Consumer Advocate and Protection Division's Motion to Compel Discovery and File Supplemental Testimony* ("Motion") filed on October 22, 2004. In its *Motion*, the Consumer Advocate asks the Authority to (1) either strike certain previously-filed testimony or allow the filing of supplemental testimony [*Supplemental Testimony of Terry Buckner* ("Buckner Testimony")] attached to its *Motion*; (2) compel BellSouth to fully respond to the discovery described in the Consumer Advocate's *Motion*; (3) allow the Consumer Advocate to file additional testimony resulting from its review of any additional discovery responses received from BellSouth; and (4) schedule a pre-hearing conference to address the issue of postponing the Hearing on the merits of the PRI exemption issue if BellSouth does not fully supplement its discovery responses by October 27, 2004.<sup>1</sup>

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<sup>1</sup> *Motion*, pp 4-5 (October 22, 2004).

## **Background**

On August 2, 2004, the Consumer Advocate filed the following discovery requests:

**Interrogatory No. 10:** Since January 1, 1999, has the Company ever reduced the price of any Primary Rate ISDN service offering in response to a competitive offering of such service (or service substitute) by a competing company or person? If so, provide a summary of each such rate reduction, including a description of the competitive offering that prompted the rate reduction.<sup>2</sup>

**Request for Production No. 3:** Identify and produce a copy of all communications and documents pertaining or referring to any study, survey, analysis, review, summary, comment or report of any kind regarding the competitive environment or state of competition in the Primary Rate ISDN service market in Tennessee. Consistent with the preceding preliminary matters, if the Company is aware of or in possession of such communications or documents but claims that it is not required to respond or produce on the basis of privilege, immunity, or otherwise, provide a complete explanation concerning the basis for any such nonresponse [sic] or nonproduction [sic], including a written statement evidencing sufficient information to allow the TRA to rule on any motion to compel.

A copy of BellSouth's response to Request for Production No. 3 has not been filed in this docket. On August 16, 2004, BellSouth provided a response to Interrogatory No. 10 as follows:

**Response:** Yes. Since January 1, 1999, BellSouth has entered into numerous contract service arrangements and tariffed promotions which have included price reductions for Primary Rate ISDN service. A list of CSAs is provided in Attachment 1.<sup>3</sup>

On August 30, 2004, the Consumer Advocate filed the following request for production:

**Request for Production No. 1:** Provide a copy of every Revenue, Cost & Contribution Summary for every CSA offering PRI-ISDN in Tennessee. Include in your response all Volume and Term CSAs providing PRI-ISDN in Tennessee.<sup>4</sup>

On September 13, 2004, BellSouth responded to Request for Production No. 1 as follows:

**Response:** This information is proprietary and is provided under separate cover.<sup>5</sup>

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<sup>2</sup> *Consumer Advocate and Protection Division's First Set of Discovery Requests Regarding Primary Rate ISDN Service Propounded to BellSouth Telecommunications, Inc*, p 9 (August 2, 2004)

<sup>3</sup> *See Motion*, p. 2 (October 22, 2004) BellSouth did not file any discovery responses with the Authority

<sup>4</sup> *Consumer Advocate and Protection Division's Second Set of Discovery Requests Regarding Primary Rate ISDN Service Propounded to BellSouth Telecommunications, Inc*, p 10 (August 30, 2004)

<sup>5</sup> *See Motion*, p 2 (October 22, 2004). BellSouth did not file any discovery responses with the Authority.

On October 4, 2004, the Consumer Advocate filed the *Direct Testimony of Terry Buckner* (“*Buckner Direct Testimony*”). The *Buckner Direct Testimony* included the following statement:

BellSouth’s pricing behavior demonstrates their efficacy in muting existing or potential competition for PRI ISDN service. Without regulatory restraint, such anti-competitive behavior could lead to price-squeezing and predatory pricing in the future. For example, as shown in Schedule 6 (**PROPRIETARY**), two existing BellSouth PRI ISDN CSA’s revenue contributions are less than their respective costs over the term of the contracts (Tariff #2003851 and #040227). This long-term pricing strategy for PRI ISDN service could succeed only for a dominant carrier.<sup>6</sup>

On October 18, 2004, BellSouth filed the *Rebuttal Testimony of Kathy K Blake* (“*Blake Testimony*”). The *Blake Testimony* included the following statement:

Q. Mr. Buckner Alleges that the two CSAs in his Schedule 6 are discounted below cost. Is he correct?

A. No. The costs shown by Mr. Buckner are inaccurate for CSAs filed since 2003. Cost support for PRI service was initially filed on September 23, 1996 with the tariff for this service. Updated cost information (reflecting lower costs) was filed with a tariff introducing a new term option. This tariff was filed with the Authority on November 22, 2002 and became effective on December 23, 2002. The updated cost information is not reflected in Mr. Buckner’s schedule. This new cost support information applies to any CSAs filed after December 22, 2002. Attached as Rebuttal Exhibit KKB-2 are the revenue, cost and contribution calculations for these two CSAs using the correct costs. These calculations show that costs are only 55% to 61% of the contract revenue.<sup>7</sup>

BellSouth filed Rebuttal Exhibit KKB-2 separately on October 18, 2004 as proprietary information governed by the protective order previously entered in this docket.

The *Buckner Supplemental Testimony* attached to the Consumer Advocate’s *Motion* included the following statement:

BellSouth provided rebuttal testimony and a related rebuttal exhibit with information previously requested, but not provided to the CAPD. This information was relevant to conclusions made in my direct testimony with related exhibits, and had I been provided the information, as requested, my direct

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<sup>6</sup> *Buckner Direct Testimony*, p. 5 (October 4, 2004)

<sup>7</sup> *Blake Testimony*, p. 12 (October 18, 2004)

testimony would have been different.

Based on the rebuttal testimony and related exhibit of BellSouth, two PRI ISDN CSAs (Tariffs #2003851 and #040227) revenue contributions are **not** less than their respective costs over the term of the contracts. My direct testimony and conclusions on Page 5, Lines 13-16 and related proprietary exhibit, Schedule 6 would not have been submitted. The financial reason for this revision is that BellSouth had reduced the cost of an essential and the highest tariff priced PRI ISDN element – PRI Interface by over 65% near the end of 2002. Consequently, this reported reduction in cost created significantly more gross margin available for discounts by BellSouth and reasonably explains the growth trend in the discount percentages for PRI ISDN CSAs as shown in Schedule 5 of my Non-Proprietary Exhibits.<sup>8</sup>

On October 25, 2004 the Hearing Officer issued an order shortening the time for responses to the Consumer Advocate's *Motion*. Pursuant to the Hearing Officer's order, the *BellSouth Response to Motion to Compel Discovery and File Supplemental Testimony* ("Response") was filed on October 27, 2004. The Consumer Advocate filed the *Consumer Advocate and Protection Division's Reply to BellSouth Response to Motion to Compel Discovery and File Supplemental Testimony* ("Reply") on October 28, 2004.<sup>9</sup> No other party filed a response to the *Motion*.

### **Positions of the Parties**

The Consumer Advocate states in its *Motion* that, regarding BellSouth's response to Request for Production No. 1,

BellSouth provided only a partial response; of the approximately 594 CSAs identified by BellSouth, the Consumer Advocate received the requested Revenue, Cost & Contribution Summary documents for approximately 240 CSAs. With regard to the approximately 354 CSAs for which the Consumer Advocate did not receive the requested documents, counsel for the Consumer Advocate contacted counsel for BellSouth in an effort to obtain such documents. After checking into the matter, BellSouth informed the Consumer Advocate that the requested documents either did not exist or could not be located but that BellSouth would

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<sup>8</sup> *Motion*, [attached *Supplemental Testimony of Terry Buckner*, pp. 1-2] (October 22, 2004)

<sup>9</sup> Authority Rule 1220-1-2- 06(3) provides that no reply to a response shall be filed except upon leave given or upon the order of the Authority or Hearing Officer. However, pursuant to Authority Rule 1220-1-2-.22 and in the interest of not delaying this proceeding the Hearing Officer will consider the additional contentions asserted in the *Reply*.

provide the Consumer Advocate with the documents if BellSouth obtained them.<sup>10</sup>

The Consumer Advocate stated in its *Motion* that it has been prejudiced by receiving late and incomplete responses to its discovery and that the conclusions presented in the *Buckner Direct Testimony* would have been different if the Consumer Advocate had timely received additional responses per the procedural schedule governing this docket.<sup>11</sup> The Consumer Advocate stated that the *Buckner Supplemental Testimony* attached to its *Motion* would have been filed earlier had it received a timely response to its discovery.<sup>12</sup>

In its *Response*, BellSouth stated that its previously filed testimony “did not contain information withheld in discovery.”<sup>13</sup> BellSouth stated “the cost information addressed by [the *Buckner Direct Testimony*] was provided in BellSouth’s Response to CAD’s Second Discovery Request, Request for Production Item 3, Attachment 6, TRA Tariff 2002-461.”<sup>14</sup> BellSouth stated that the information provided in its rebuttal testimony was not provided during the discovery phase of this docket because it did not exist at the time.<sup>15</sup> BellSouth stated further that the new information was developed in response to what it characterizes as “erroneous information” contained in the *Buckner Direct Testimony* and that the new information was “compiled using the same information that BellSouth provided to the Consumer Advocate on September 13, 2004.”<sup>16</sup> BellSouth stated that it does not object to allowing the Consumer Advocate to file the *Buckner Supplemental Testimony* as requested in the Consumer Advocate’s *Motion*.<sup>17</sup> BellSouth stated that “the additional testimony clarifies that BellSouth and the

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<sup>10</sup> *Motion*, pp 2-3 (October 22, 2004)

<sup>11</sup> *Motion*, p 4 (October 22, 2004)

<sup>12</sup> *Motion*, p 4 (October 22, 2004)

<sup>13</sup> *Response*, p. 2 (October 27, 2004).

<sup>14</sup> *Response*, p. 1 (October 27, 2004)

<sup>15</sup> *Response*, p 1 (October 27, 2004)

<sup>16</sup> *Response*, p 1 (October 27, 2004)

<sup>17</sup> *Response*, p. 1 (October 27, 2004)

[Consumer Advocate] agree that BellSouth has not engaged in below-cost pricing in its CSAs for PRI. Mr. Buckner's mistake, however, was not due to any failure by BellSouth to *provide* discovery. Instead, it was the result of the [Consumer Advocate's] failure to *review and read* the discovery provided."<sup>18</sup>

In its *Reply* the Consumer Advocate points to the fact that the "question in dispute" regards the cost of service for PRI CSAs and that of the approximately 594 PRI CSAs identified during discovery, cost information in the form of Revenue, Cost & Contribution Summaries has only been provided for approximately 240 of the 594 PRI CSAs and has not been provided for approximately 354 PRI CSAs.<sup>19</sup> The Consumer Advocate states that the response BellSouth provided to Consumer Advocate Request for Production No. 3 provided different cost information than was provided in response to Consumer Advocate Request for Production No. 1 and did not provide a basis for the Consumer Advocate to determine the cost of service for the other 354 CSAs.<sup>20</sup> The Consumer Advocate stated that "the only reason the Consumer Advocate desires to file supplemental testimony is to present analysis and conclusions on BellSouth's 'newly-created' Revenue, Cost & Contribution Summaries reflecting cost information for PRI CSAs that the Consumer Advocate requested on August 30, 2004" and that "BellSouth should be compelled to properly respond to discovery."<sup>21</sup>

On October 29, 2004, the Hearing Officer was contacted by telephone by Counsel for BellSouth and Counsel for the Consumer Advocate. During this phone call Counsel for BellSouth explained that the requested Revenue, Cost & Contribution Summary documents had been generated at the time each CSA at issue in this dispute was generated but that, consistent

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<sup>18</sup> *Response*, pp 1-2 (October 27, 2004)

<sup>19</sup> *Reply*, pp. 1-2 (October 28, 2004).

<sup>20</sup> *Reply*, p 2 (October 28, 2004).

<sup>21</sup> *Reply*, p 3 (October 28, 2004)

with its previous representations to the Consumer Advocate (as noted in the Consumer Advocate's *Motion*),<sup>22</sup> the requested documents either did not currently exist or could not otherwise be located. Counsel for BellSouth reconfirmed that BellSouth would provide the Consumer Advocate with the requested documents if BellSouth obtained them. Counsel for BellSouth also confirmed that BellSouth has no objection to granting the Consumer Advocate's request to allow the filing of the *Buckner Supplemental Testimony* attached to its *Motion*. Counsel for the Consumer Advocate agreed that BellSouth's assurance that no additional summaries could be produced together with BellSouth's agreement to the filing of the *Buckner Supplemental Testimony* in this docket constitutes a proper resolution to its *Motion*.

### **Discussion and Analysis**

The dispute here centers on the Consumer Advocate's perception that there are approximately 354 Revenue, Cost & Contribution Summary documents in BellSouth's possession that it should have produced in response to the Consumer Advocate's discovery requests. This belief is based, in part, on the two exhibits attached to the *Blake Testimony* that, at first glance, appear to belong to the group of 354 summary documents that have not been produced. BellSouth has consistently stated that the requested documents either do not currently exist or cannot otherwise be located. Although the Hearing Officer finds the Consumer Advocate's reaction to the filing of two exhibits attached to the *Blake Testimony* that reasonably appeared to be documents that were the subject of previous discovery requests reasonable, the Hearing Officer also finds BellSouth's explanation regarding the nature of the two exhibits to the *Blake Testimony* to be reasonable. After reviewing the *Motion*, the *Response*, and the relevant portions of the record, and in light of the positions of BellSouth and the Consumer Advocate as confirmed during the above-referenced October 29, 2004 telephone conference, the Hearing

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<sup>22</sup> See *Motion*, pp. 2-3 (October 22, 2004)

Officer finds that no party has objected to the Consumer Advocate's request to allow the filing of the *Buckner Supplemental Testimony* attached to its *Motion*. The Hearing Officer finds that the Consumer Advocate's motion to compel BellSouth to fully respond to discovery and its corresponding request to file testimony based on a review of the compelled testimony are moot.

**IT IS THEREFORE ORDERED THAT:**

1. The Consumer Advocate's request to allow the filing of the supplemental testimony attached to its *Motion* is granted and the *Buckner Supplemental Testimony* is hereby accepted as pre-filed testimony in this docket.

2. All other requests for relief contained in the Consumer Advocate's *Motion* are denied as moot.

  
Randal L. Gilliam, Hearing Officer